Compare *In re Jensen,* 59 N.Y.Supp. 653, 655; *Bray* v. *Wallingford,* 20 Conn. 416, 418; *County of Lancaster* v. *Trimble,* 34 Neb. 752, 756; 52 N.W. 711; *Rains* v. *City of Oshkosh,* 14 Wis. 372, 374; 1 Black. Comm. 123.

In the *South Carolina* case this court disposed of the question by holding that since the state was not exempt from the tax, the statute reached the individual sellers who acted as dispensers for the state. While not rejecting that view, we prefer, in the light of the foregoing examples, to place our ruling upon the broader ground that the state itself, when it becomes a dealer in intoxicating liquors, falls within the reach of the tax either as a "person" under the statutory extension of that word to include a corporation, or as a "person" without regard to such extension. The motion for leave to file the bill of complaint, accordingly, is

Denied.

MR. JUSTICE STONE concurs in the result.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* INDEPENDENT LIFE INSURANCE CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 689. Argued April 4, 1934.—Decided May 21, 1934.

1. A federal tax upon part of a building occupied by the owner, or upon the rental value of the space, is a direct tax and invalid unless apportioned. P. 378.
2. The rental value of a building used by the owner does not constitute income within the meaning of the Sixteenth Amendment. P. 379.
3. In computing the net income of life insurance companies under the Revenue Acts of 1921 and 1924, deductions for taxes, expenses, and depreciation, in respect of real estate owned and occupied in whole or in part by the taxpayer, are not permitted unless there be

included in gross income the rental value of the space so occupied, which amount must be not less than a sum which in addition to any rents received from other tenants shall provide a net income at the rate of 4 per centum of the book value of the real estate. *Held*, not inconsistent with the constitutional prohibition of unapportioned direct taxes. Art. I, § 9, cl. 4. Pp. 378, 381.

4. Congress has power to condition, limit, or deny deductions from gross income in order to arrive at the net that it chooses to tax. P. 381.

5. *National Life Ins. Co.* v. *United States*, 277 U.S. 508, distinguished. P. 381.

67 F. (2d) 470, reversed.

CERTIORARI, 291 U.S. 655, to review a judgment affirming a judgment of the District Court, which sustained a decision of the Board of Tax Appeals, 17 B.T.A. 757, adjudging an overpayment of income tax. A certificate in this case was dismissed, 288 U.S. 592.

Solicitor General Biggs, with whom *Assistant Attorney General Wideman* and *Messrs. Sewall Key, J. Louis Monarch*, and *H. Brian Holland* were on the brief, for petitioner.

The statute involved, in effect, limits the allowance for expenses of operating a building which is occupied in part by an insurance company to those expenses which are attributable to the portion of the building devoted to the production of investment income. Since no other income is taxed, it was the purpose of Congress to prevent the investment income from being reduced by expenses of producing non-taxable income.

There can be no doubt of the power of Congress to deny or limit deductions, and the legislative history of the statute shows that Congress adopted the present method after careful consideration, as the most workable method of achieving the desired result. Apparently the way chosen was approved by the insurance companies. As a consequence the statute allows the deduction of the

expenses of operating the entire building and accomplishes the limitation by requiring the taxpayer who claims such deductions to report the rental value of the space occupied by it as gross income.

The attack upon the constitutionality of the statute amounts to no more than a criticism of the method by which Congress has exercised an admitted power. The result does not destroy guaranteed exemptions or put the burden upon one entitled to the exemption which he would not otherwise bear, as in *National Life Ins. Co.* v. *United States,* 277 U.S. 508. No direct tax is laid upon rental value of the property. Taxing the rental value is not the object at which the statute is aimed, and the fact that the rental value of space occupied is incidentally and casually affected is immaterial.

The tax upon life insurance companies is not the ordinary tax upon all income but a special tax upon a limited class of income. Despite its inclusion in an income tax statute it is in the nature of a special excise tax upon life insurance companies. Were it expressly called an excise it would not be invalid because measured in part by something not directly taxable, and no necessity for apportionment would exist. In determining the validity of a statute its form should not control.

The respondent did not except to the action of the Commissioner on the ground that the statute violates the Fifth Amendment, and no sufficient basis for consideration of that question appears in the record.

The taxpayer claimed and has received the benefit of deductions which are conditioned upon the inclusion of the rental value in gross income. It is well settled that one who has received a benefit under a statute will not be heard to assail it. Constitutional questions may be waived as well as others. The application of that rule to this case would result in limiting the deductions in the

way Congress intended. On the other hand, if the rule is not applied and the statute is held invalid, the investment income which Congress intended to tax will be reduced by some expenses which contributed to the production of nontaxable income.

If the provision under attack is held invalid, then the provision allowing deductions for real estate expenses must fall, insofar as it applies to home office property, for the provisions are inseparable. Then a life insurance company would be entitled to no deductions for expenses connected with its office building.

Mr. Wm. Marshall Bullitt, with whom *Mr. James A. Newman* was on the brief, for respondent.

Taxation of the "rental value" of such buildings to the extent that they were occupied by their owners, was a direct tax on the land itself, levied solely because of ownership; and such a tax is void unless apportioned.

If an insura ce company rents a building to use as its Home Office, but does not occupy all the space, the Revenue Act does not tax the company on the "rental value" of (a) the space it occupies; or (b), the vacant space which it does not occupy; and this is solely because the company does not own the building.

But, on the other hand, if an insurance company owns its Home Office Building, and occupies any portion thereof (whether one room or several floors) the Revenue Act taxes it on the "rental value" of all the space it so occupies, and this tax is imposed solely because the company owns the building.

The Government may argue that the tax is not levied solely because of ownership, but because of (1) ownership, plus (2) occupancy of the thing owned. That is simply an argument that the owner of land or of personal property may be taxed (without apportionment) for the privilege of occupying or possessing that which he owns; and that such a tax is not a "direct" tax on the thing

owned, but is an " excise " tax for the privilege of occupying or possessing the thing owned.

The very essence of ownership is the right to the possession (i.e., the occupancy) of the thing owned. *Dawson* v. *Kentucky Distilleries,* 255 U.S. 288.

This Court has always held that a tax on land is a direct tax. If, then, this Court shall now decide that it is an excise tax, for Congress to tax a landowner a percentage of (a) the market value of the real estate or (b) an annual rental value, simply for the privilege of the landowner occupying his own land, then the constitutional guaranty against direct taxation disappears, and nothing whatever is left of that fundamental guaranty.

A tax on rents from real estate is still a direct tax on the land itself,—although the Sixteenth Amendment has removed the necessity of apportionment in levying a tax on such rents.

The rental value of land when occupied by its owner, does not constitute income to the owner within the meaning of the term income as used in the Sixteenth Amendment. *Commissioner* v. *Independent Life Ins. Co.,* 67 F. (2d) 470, 472.

The particular rental value which the Revenue Acts compelled the insurance companies to include as income (and to pay income taxes thereon) was an arbitrary sum having no reasonable relation to income in any constitutional sense.

After deducting taxes, expenses and depreciation from the actual rents collected from all other tenants in the building, the company must also include in its income (as the rental value of the space it occupies) such further sum, as when added to the net rent received from the other tenants, will produce a net taxable rental income for the entire building of 4% upon its book value.

One insurance company's book value of its building may bear no relation whatsoever to cost, rental return or

market value, or to the book value, of any other company's building.

The Revenue Acts, in thus defining what income the company shall return, do not use any definition of income which falls within the definitions prescribed by this Court in many cases, but prescribe as income a purely arbitrary and capricious sum, bearing no relation to reality or to any authoritative definition of income.

The tax imposed by §§ 242–245 is an income tax; and it is not in any sense a special excise tax for the privilege of engaging in the life insurance business. *National Life Ins. Co.* v. *United States,* 277 U.S. 508; *Massachusetts Mutual* v. *United States,* 288 U.S. 269.

Flint v. *Stone Tracy Co.,* 220 U.S. 107, and *Stratton's Independence* v. *Howbert,* 231 U.S. 399, arose under the 1909 Corporation Tax Act before any income tax had even been adopted. *Stanton* v. *Baltic Mining Co.,* 240 U.S. 103, which arose under the 1913 Income Tax Act, was disposed of on the same grounds as *Brushaber* v. *Union Pacific,* 240 U.S. 1; and its reference to *Stratton's Independence* was dictum and illustrative only.

Congress can not impose an unconstitutional condition, to-wit, that a person shall surrender or waive a constitutional right as the price of receiving some benefit allowed to others. *National Life Ins. Co.* v. *United States,* 277 U.S. 508.

The power to impose conditions can not be used to accomplish a prohibited result. *Miller* v. *Milwaukee,* 272 U.S. 713, 715; *Nichols* v. *Coolidge,* 274 U.S. 531, 541–2; *Frost Trucking Co.* v. *Railroad Comm'n,* 271 U.S. 583, 593.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This case involves the validity of deficiency assessments of income taxes made by the Commissioner against the life insurance company for 1923 and 1924. The 1921 Revenue Act (42 Stat. 261), § 244 (a) defines gross in-

come of such companies as that received from interest, dividends and rents. Premiums and capital gains are excluded. Section 245 (a) directs that net income be ascertained by making specified deductions from gross income. These include four per cent. of the company's reserve, "(6) Taxes and other expenses paid during the taxable year exclusively upon or with respect to the real estate owned by the company . . ." and "(7) A reasonable allowance for the exhaustion, wear and tear of property, including a reasonable allowance for obsolescence." But it is provided, § 245 (b), that no deduction shall be made under paragraphs (6) and (7) "on account of any real estate owned and occupied in whole or in part by a life insurance company unless there is included in the return of gross income the rental value of the space so occupied. Such rental value shall be not less than a sum which in addition to any rents received from other tenants shall provide a net income (after deducting taxes, depreciation, and all other expenses) at the rate of 4 per centum per annum of the book value at the end of the taxable year of the real estate so owned or occupied." Provisions similarly worded and having the same meaning are contained in the Revenue Act of 1924, §§ 244, 245, 43 Stat. 289.

During 1923 and 1924 respondent owned a building of which it occupied part and rented part. Its tax return for each year included in gross income the rents received for the space let and deducted the taxes, expenses and depreciation chargeable to the whole building. The result for 1923 was a net of $3,615.30 whereas four per cent. of book value amounted to $18,400. The result for 1924 was minus $14,629.76, four per cent. of the then book value being $19,770.32. The Commissioner, following § 245 (b) added to the rents received from lessees in each year a sum sufficient to make the net equal to the required four per cent. On that basis the amount of the deficiency for

1923 was $298.97, and for 1924, $1,115.65.[1] The board of Tax Appeals held them direct taxes and therefore invalid. 17 B.T.A. 757. The Circuit Court of Appeals affirmed, one of the judges dissenting. 67 F. (2d) 470. Its decision conflicts with *Commissioner* v. *Lafayette Life Ins. Co.* (C.C.A.–7), 67 F. (2d) 209, and *Commissioner* v. *Rockford Life Ins. Co.* (C.C.A.–7), 67 F. (2d) 213.

The question for decision is whether the statutory provisions relied on violate the rule that no direct tax shall be laid unless in proportion to the census. Constitution, Art. I, § 9, cl. 4. In support of the decision below, respondent maintains that the "rental value" of the space occupied by it was included in net income and taxed and that the exaction is a direct tax on the land itself and void for lack of apportionment.

If the statute lays taxes on the part of the building occupied by the owner or upon the rental value of that space, it cannot be sustained, for that would be to lay a direct tax requiring apportionment. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429, 580, 581; 158 U.S. 601, 635, 637, 659. *Brushaber* v. *Union Pac. R. Co.*, 240 U.S. 1, 16, 17. *Eisner* v. *Macomber*, 252 U.S. 189, 205. *Daw-*

[1] In 1923, rents were $73,620.48. Taxes, expenses and depreciation were $70,005.18. Book value was stipulated to be $460,000. The commissioner called the difference between $18,400 (4% of $460,000) and $3,615.30 ($73,620.48—$70,005.18) or $14,784.70 the "value of space owned and occupied by company." That, added to rents received, amounted to $88,405.18. He then subtracted from gross income so increased the sum of permissible deductions, including the $70,005.18.

In 1924, rents were $71,289.21. Taxes, expenses and depreciation were $85,918.97. Book value was $494,257.97. The commissioner added $19,770.32 (4% of $494,257.97) and $14,629.76 ($71,289.21—$85,918.97) and called the sum, $34,400.08, the "value of space owned and occupied by company." That, added to rents received, amounted to $105,689.29; and from gross income so increased were subtracted the deductions, including the $85,918.97.

son v. *Kentucky Distilleries Co.*, 255 U.S. 288, 294. *Bromley* v. *McCaughn*, 280 U.S. 124, 136. *Willcuts* v. *Bunn*, 282 U.S. 216, 227. The rental value of the building used by the owner does not constitute income within the meaning of the Sixteenth Amendment. *Eisner* v. *Macomber, supra*, 207. *Stratton's Independence* v. *Howbert*, 231 U.S. 399, 415, 417. *Doyle* v. *Mitchell Bros. Co.*, 247 U.S. 179, 185. *Bowers* v. *Kerbaugh-Empire Co.*, 271 U.S. 170, 174. *Taft* v. *Bowers*, 278 U.S. 470, 481, 482. *MacLaughlin* v. *Allianee Ins. Co.*, 286 U.S. 244, 249, 250. Cf. *Burk-Waggoner Assn.* v. *Hopkins*, 269 U.S. 110, 114.

Earlier Acts taxed life insurance companies' incomes substantially the same as those of other corporations. Because of the character of the business, that method proved unsatisfactory to the Government and to the companies. The provisions under consideration were enacted upon the recommendation of representatives of the latter. As rents received for buildings were required to be included in gross and expenses chargeable to them were allowed to be deducted, it is to be inferred that Congress found—as concededly the fact was—that the annual net yields from investments in such buildings ordinarily amounted to at least four per cent. of book value. Where an insurance company owns and occupies the whole of a building, it receives no rents therefor and is not allowed to deduct the expenses chargeable to the building. Where part is used by the company and part let, the rents are required to be included in the gross, but expenses may not be deducted unless, if it be necessary, there is added to the rents received an amount to make the total sufficient, after deduction of expenses, to leave four per cent. of book value. All calculations contemplated by § 245 (b) are made subject to that limitation. Congress intended that the rule should apply only where rents exceed such four per cent. Where they are less than that, addition of the

prescribed rental value and deduction of expenses operate to increase taxable income.[2] The classification is not without foundation.

The company is not required to include in gross any amount to cover rental value of space used by it, but in order that, subject to the specified limitation, it may have the advantage of deducting a part of the expenses chargeable to the building, it is permitted to make calculations by means of such an addition. The statute does not prescribe any basis for the apportionment of expenses between space used by the company and that for which it receives rents. The calculation indicated operates as such an apportionment where the rents received are more than four per cent. of book value, but less than that amount plus expenses.[3] In such cases the addition, called rental value of space occupied by the company, is employed to permit a deduction on account of expenses. That, as is clearly shown in the dissenting opinion, 67 F. (2d) 473, is the arithmetical equivalent

[2] Take for example: book value of building, $1,000,000; 4% of book value, $40,000; rents received, $30,000; expenses, $60,000. If the calculation prescribed by § 245 (b) is not made, taxable income is $30,000.

The calculation prescribed by § 245 (b) follows: rents, $30,000, plus "rental value," $70,000 (expenses, $60,000, minus rents, $30,000, plus the 4%—$40,000) amounts to $100,000, less expenses, $60,000, leaves taxable income, $40,000. Cf. Art. 686, Treasury Regulations 62 and 65.

[3] Take for example: book value of building, $1,000,000; 4% of book value, $40,000; rents received, $50,000; expenses, $60,000.

On that basis the calculation is: rents, $50,000 plus "rental value," $50,000 (expenses, $60,000 minus rents $50,000 plus 4%, $40,000) amounts to $100,000 less expenses $60,000 leaves taxable income $40,000. Deduction of expenses operates to reduce taxable income by $10,000.

Assume rents received were $100,000. No rental value need be added. Deducting expenses, $60,000, leaves taxable income $40,000.

of lessening the deduction by the amount of the so-called rental value.

Respondent cites *National Life Ins. Co.* v. *United States,* 277 U.S. 508, but the distinction between that case and this one is fundamental and obvious. There the effect of the statutory deduction was to impose a direct tax on the income of exempt securities, amounting to taxation of the securities themselves. We held that the tax imposed, so far as it affected state and municipal bonds, was unconstitutional and that, in so far as it affected United States bonds, it was contrary to the statute. In *Denman* v. *Slayton,* 282 U.S. 514, we held the taxpayer not entitled to deduct the interest on debts incurred to purchase securities the interest on which was exempt. The opinion points out the distinction between that exclusion from deductions and the taxation of exempt securities condemned in *National Life Ins. Co.* v. *United States.* As shown above, the prescribed calculation, § 245 (b), is in substance a diminution or apportionment of expenses to be deducted from gross income under the circumstances specified. See *Anderson* v. *Forty-Two Broadway Co.,* 239 U.S. 69.

Unquestionably Congress has power to condition, limit or deny deductions from gross income in order to arrive at the net that it chooses to tax. *Burnet* v. *Thompson Oil & Gas Co.,* 283 U.S. 301, 304. *Stanton* v. *Baltic Mining Co.,* 240 U.S. 103. *Brushaber* v. *Union Pac. R. Co., supra,* 23–24. It is clear that the provisions under consideration do not lay a tax upon respondent's building or the rental value of the space occupied by it or upon any part of either.

Reversed.

MR. JUSTICE MCREYNOLDS is of opinion the judgment should be affirmed.